

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-21241

To be argued by
JOSEPH W. HENNEBERRY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JAMES CONNELL EDEN,

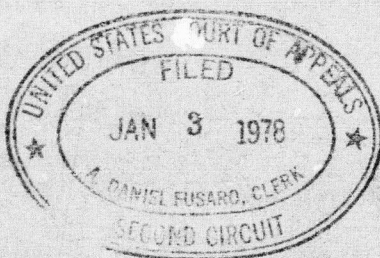
Petitioner-Appellant,

-against-

ROBERT H. KUHLMAN, Superintendent,
Woodbourne Correctional Facility,

Respondent-Appellee.
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BRIEF FOR RESPONDENT-APPELLEE



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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JAMES CONNELL EDEN, :
Petitioner-Appellant, :
-against- : Docket No.
77-2124
ROBERT H. KUHLMAN, Superintendent, :
Woodbourne Correctional Facility, :
Respondent-Appellee. :
-----X

BRIEF FOR RESPONDENT-APPELLEE

Question Presented

Was the prosecutor's opening statement at trial in
variance with the proof adduced at trial and violative of
petitioner's due process rights?

Statement

This is an appeal from a memorandum and order of the
United States District Court for the Eastern District of
New York (Neaher, J.) dated July 5, 1977 denying petitioner's
application for a writ of habeas corpus.

Facts

A. State Proceedings

On May 7, 1971, Henry Jenkins was involved in an altercation with two men on a Brooklyn street. Jenkins received a stab wound in the chest. He was observed fleeing from the area but his body was found a short time later in a nearby apartment house. Petitioner James Eden was arrested and indicted for the murder of Henry Jenkins. The testimony of two witnesses at the trial of the petitioner is pertinent to this appeal. These witnesses are Linda Townsend and Otis Warney.

Linda Townsend knew the petitioner under the name "Carnel Quick" and was friendly with him for about one year prior to May 7, 1971. She had even seen him on a daily basis prior to the murder of Henry Jenkins (T. 209-210).*

On May 7, 1971, Ms. Townsend was in the third floor apartment of her cousin, Linda Manuel, at 988 Fulton Street in Brooklyn (T. 211). During the afternoon of that date, petitioner came to the apartment and asked Ms. Manuel if she

* Prefix "T" followed by number refers to minutes of trial.

had seen Mr. Jenkins (T. 212). Ms. Manuel said no and petitioner left. Later, Ms. Townsend was looking out a window that overlooked Fulton Street and saw the petitioner (T. 213-214). She watched Mr. Jenkins leave a cab and run to where petitioner was standing with another man (T. 216, 227-229, 239 but note 230, 244-245). Petitioner and Mr. Jenkins began arguing (T. 245). Ms. Townsend saw petitioner pull a knife and waive it at Mr. Jenkins (T. 236). Although she did not see petitioner stab the deceased (T. 244), she did observe petitioner's companion kicking and hitting Mr. Jenkins (T. 216) and she observed Jenkins fall after being struck by this person (T. 216, 236). Mr. Jenkins arose from the ground and ran away (T. 216, 236). Petitioner and the other person then walked away.

It should be noted that the testimony of Ms. Townsend at trial is consistent with her testimony at the Wade Hearing prior to trial (T. 19-20). Ms. Townsend did not see petitioner stab the deceased and petitioner's attorney was on notice of this fact from the time of the preliminary hearing.

Otis Warney testified that he was the nephew of the deceased Henry Jenkins (T. 104). On the date of the crime, Mr. Warney was sitting in a cab on Fulton Street with his

cousin (T. 109-111, 135, 137, 162). At about 5:30 or 6:00 p-m., Mr. Warney saw Henry Jenkins walk toward to three men on Fulton Street. One of the three left as he approached (T. 115-116, 118, 142). Warney observed the men apparently arguing (T. 119). One man took a knife and plunged it toward Mr. Jenkins (T. 163) while the other individual, who also had a knife, got behind the deceased, grabbed him and threw him on the street (T. 120, 166-167, 201-203). Mr. Jenkins did not have a weapon (T. 169). The man who knocked Jenkins to the ground kicked him as he tried to rise and then struck at him with his knife (T. 196, 200).

Mr. Warney next testified then when Jenkins finally did get up, he ran along Fulton Street. As he passed the cab where Warney was sitting, Warney observed blood pouring through Mr. Jenkins' fingers as he clutched his stomach (T. 121). The two assailants walked away (T. 121-122). Warney followed Jenkins to an apartment building where he found him lying on the floor (T. 132).

Petitioner argues that the prosecutor's opening statement was deliberately misleading in that it varied with the above evidence adduced at trial. This opening statement (T. 55-58) was not misleading and did not vary from the proof

at trial. As to Ms. Townsend, the prosecutor clearly stated that he expected this witness to testify that she knew both the petitioner and the deceased; that on the date of the crime the petitioner came to Ms. Manuel's apartment looking for Mr. Jenkins; that she later looked out the window and saw the petitioner take out a knife, waving it and slashing it; and that she saw Henry Jenkins fall to the ground. She would also testify that another man kicked and hit the deceased; that the deceased got up and ran away; and that the petitioner walked away in another direction (T. 56-57).

As to Otis Warney, the prosecutor stated in his opening statement that he expected Warney would testify that on the date of the crime he saw someone stab his relative, Henry Jenkins, and that he also observed Jenkins holding his body and bleeding (T. 57-58).

It should be noted at this point that the defense counsel, after the prosecutor's opening statement, moved for dismissal of the indictment on the ground that the evidence outlined in the opening did not connect the petitioner with the stabbing and death of Mr. Jenkins. In light of defense counsel's vehement argument for the dismissal of the indictment at this point (T. 58-61) it cannot be said that he was misled to believe

that the proof at trial would show that the petitioner was acting as a principal in this homicide as opposed to an aider or abettor. In any event, it would not matter what the defense counsel believed since the accessory is equally as guilty of the substantive crime as the principal as we may safely presume that the defense counsel well knew this.

At the conclusion of the trial petitioner was convicted of the crime of Manslaughter in the First Degree and sentenced to an indeterminate term of imprisonment not to exceed fifteen years. Petitioner's conviction was affirmed by the Appellate Division, Second Department without opinion (49 A D 2d 699). Leave to appeal to the Court of Appeals was denied.

B. Federal Proceedings

Petitioner raised several arguments in his application for a writ of habeas corpus in the district court. The court below denied his application on July 5, 1977 but in a memorandum order dated August 16, 1977 granted a certificate of probable cause for appeal pursuant to Rule 22, F.R.A.P. on the grounds that "there may be a question of constitutional significance in failing to disclose in a State indictment that

a person charged with homicide may also be convicted on the theory that he was an accessory to the homicide" (A. 29).*

Statutes Involved

New York Penal Law § 20.00

"Criminal liability for the conduct of another.

When one person engages in conduct which constitutes an offense, another person is criminally liable for such conduct when, acting with the mental culpability required for the commission thereof, he solicits, requests, commands, importunes, or intentionally aids such person to engage in such conduct."

POINT I

THE INDICTMENT WAS PROPER

By enacting § 20.00 of the Penal Law, New York has equated accessories to principals. Similar statutes of Congress and other states have been upheld as constitutional. Pereira v. United States, 347 U.S. 1 (1953); Nye & Nissen v. United States, 336 U.S. 613 (1949); Jim Fuey Moy v. United States, 254 U.S. 189 (1920).

* Prefix "A" followed by number refers to page numbers of Appendix on Appeal.

It is also settled law in this Circuit that a defendant may be indicted for the commission of a substantive crime and convicted of aiding and abetting its commission although not named in the indictment as an aider or abettor. It is unnecessary that the principal be first convicted or even identified. United States v. Tropiano, 418 F. 2d 1069, 1083 (2d Cir. 1969); United States v. Russo, 284 F. 2d 539 (1960); United States v. Ramsey, 374 F. 2d 192 (2d Cir. 1967); United States v. Pellegrino, 470 F. 2d 1205 (2d Cir. 1972).

Other Circuits are in accord. United States v. Di Prima, 472 F. 2d 550 (1st Cir., 1953); United States v. Ehrenberg, 354 F. Supp. 460 (E.D. Penna. 1973), affd. 485 F. 2d 682 (3d Cir., 1973); United States v. Heard, 443 F. 2d 856 (6th Cir., 1971); United States v. Fryer, 419 F. 2d 1346 (8th Cir., 1970); Theriault v. United States, 401 F. 2d 79 (8th Cir., 1968); Swanne Soon Young Pang v. United States, 209 F. 2d 245 (9th Cir., 1953).

Since the common law distinction between principal and accessory has been abolished in New York (People v. Bliven, 112 N.Y. 79 [1889]; People v. Katz, 209 N.Y. 311 [1913]), petitioner is not entitled to any distinction being made in an indictment. Whether petitioner stabbed Mr. Jenkins or aided

the second man in stabbing Mr. Jenkins is irrelevant. Both are equally guilty and the indictment of petitioner is proper.

POINT II

THE OPENING STATEMENT OF THE
PROSECUTOR DID NOT VARY WITH
THE PROOF ADDUCED AT TRIAL
AND WAS NOT VIOLATIVE OF
PETITIONER'S DUE PROCESS RIGHTS

Petitioner argues that he is entitled to know the theory of prosecution. He states that this theory is discoverable by a motion for a bill of particulars yet admits that he did not make such a motion. Petitioner then equates the prosecutor's opening statement to a bill of particulars that must be strictly adhered to. Petitioner finally argues that the opening statement misled him to believe that the theory of prosecution would be that he was the principal in the homicide, not an aider or abettor. Petitioner is apparently referring to that part of the opening statement where the prosecutor stated that Mr. Warney will tell you "he saw someone stab his relative" (T. 57). This argument is in total disregard of Penal Law § 20.00. In any event, the prosecutor at no point stated that any witness would testify seeing petitioner plunge the knife into the deceased.

Petitioner claims that he was misled by this opening statement and that his trial strategy was effected. Petitioner, however, does not tell us exactly how it was effected nor does he spell out how he was prejudiced, if at all.

Petitioner's attempt to equate the opening statement to a bill of particulars fails. Even if petitioner had moved for a bill of particulars and there was a variance between the bill and proof, there would be no reversal unless he established actual and substantial prejudice resulting from unfair surprise. United States v. Glaze, 313 F. 2d 757 (2d Cir. 1963). Petitioner has not shown prejudice and cannot show prejudice since he is equally guilty as a principal or accessory.

The prosecutor's opening statement in relation to what he expected Mr. Warney to testify to was merely a comment on a reasonable inference the jury could draw from the testimony of Warney as it in fact developed. When one sees two men with knives struggling with a third man and then sees that third man clutching his body and bleeding, it is certainly a fair comment to say someone stabbed the third man. Again, at no time did the prosecutor say that either eyewitness would testify they actually saw petitioner plunge the knife into the body of the deceased. If the prosecutor had said this, then the petitioner

would have been misled. Even so, this would not be per se reversible error but rather a question of the good faith of the prosecutor in making the statement. Gladden v. Frazier, 388 F. 2d 777 at 779 (9th Cir., 1968). This question is not reached in this appeal.

Petitioner has no general constitutional right to discovery in a criminal case. Weatherford v. Bursey, 45 USLW 4154, 4158, ___ U.S. ___, February 22, 1977. In any event, he did not avail himself of the discovery procedures that were available to him since he did not move for a bill of particulars. Petitioner's logic in stating that the prosecutor's opening statement misled him is strained since it obviously does not state that petitioner acted as principal, since the defense counsel at trial was obviously aware of this in making his motion to dismiss this indictment subsequent to the prosecutor's opening statement and since Penal Law § 20.00 makes no distinction between principal and accessory. The decision of the court below should be affirmed.

CONCLUSION

THE DECISION OF THE DISTRICT COURT
SHOULD BE AFFIRMED

Dated: New York, New York
January 3, 1978

Respectfully submitted,

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